Carabells' property is no longer adjacent to or contiguous to Lake St. Clair as demonstrated by the fact that it is separated from the lake by one mile of numerous residential subdivision developments. (Pg 2. Carabells' C of A Brief). In order to gain jurisdiction over Carabells' property, the Corps has determined under 33 C.F.R. 328.3(a)(5), that Carabells' property is some how (however remotely) hydrologically connected to "navigable waters" because rain water runoff from his property might drain into Lake St. Clair. In summary, the Corps' position in that because Carabells' property may have been submerged land, perhaps in prehistoric times or more recently, and that his property was at some point in time "land beneath navigable water" of Lake St. Clair or one of its tributaries, it therefore is still part of "waters of the United States".

Amicus curiae (hereinafter "Harkins") brings to the attention of this Honorable Court that both the Supreme Court's decision in *Riverside Bay View Homes, Inc, supra,* as well as the EPA and Corps subsequent redefinition of "water of the United States" are inconsistent with definitions in other acts of Congress, the United States Code as well as case decisions of this Honorable Court, and

state appellate courts..

It is Harkins' position that the definition of "water of the United States' should be consistent under the CWA and the Submerged Land Act 43 U.S.C. 1301 (herein SLA). The SLA under 43 U.S.C. 1301(f) states;

> " the term "**lands beneath navigable waters**" **does not** include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and **if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;"**

This notion that only unpatented bottom land is within the jurisdiction of the United States is not a new concept. This Honorable Court on June 6, 2005 in *State of Alaska v. United States* 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005) decided a dispute as to whether title under certain submerged land was conveyed by the United States to the State of Alaska thereby using the definition of

"waters of the United States" under the SLA. Furthermore, *Executive Order 11990* entitled **Protection of Wetlands** signed by President Jimmy Carter, May 24, 1977 states; "This Order **does not apply to** the issuance by Federal agencies of permits, licenses, or **allocations to private parties for activities involving wetlands on non-Federal property**. It is undisputed that title to Carabells' property was conveyed either by State or Federal patent. It makes no difference whether the Federal Government gave title directly to Carabells' predecessors in title or gave it the State of Michigan who in turn gave title to Carabells' predecessors. The Carabells were able to obtain title to such land.

> "Upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *Ozark-Mahoning Co. v State*, pg 490 37 N. W. 2d 488 citing *United States v. Oregon*, 295 U.S. 1, 55 S.Ct.

610, 615, 79 L.Ed. 1267 April 1, 1935

"The question of whether waters within a state are navigable at the time of the state's admission to the Union is a Federal Question. If such waters in a state are not navigable in fact at time of its admission to the Union, the title of the United States to lands underlying such waters remain unaffected." Id.

The record is clear that the Carabells own the 19.61 acres upon which they seek to develop. The determination of whether the Carabells are heirs and assigns of the original purchaser of a state patent (assumes land under navigable water at statehood) or a federal land (assumes land was under non-navigable water at statehood) is not important. It is only important to note that it came from either a state sovereign or a federal sovereign.

In either event the United States gave up its rights to the land for which title passes. Under *Ozark-Mahoning*, "the rights of the grantee under patents issued by the United States government are fixed and vested as of the dates of the patents." In cases where the lands were transferred to the State, 43 U.S.C. 1314 limits the rights and powers retained by the United States to that of purchase of the

natural resources if they can or condemnation of lands if they must. Specifically under SLA 43 U.S.C. 1311 (2) "the rights and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States....."

It is the Corps' position that the lands Carabells now own were once under Lake St. Clair. Under SLA, these lands would be exclusive jurisdiction of the State. Harkins suggests an example of this law is action is where a natural resource such as oil or gold is discovered under lands upon which the federal government has transferred title to the State, under 43 U.S.C. 1311 (2) the Federal government has no interest in the natural resource. (Except buy or condemnation) The fact the property was conveyed to Carabells or other private parties would have no effect. Now assume that waters recede under the Corps' theory and another Natural Resource Wetlands are created, the Corps newly created definitions of "waters of the United States" now would allow them to come in and regulate. This new definition may also allow them to come forward and claim

the oil and gold in our example.(note, prior to the enactment of 33 C.F.R. 328.3(a), the Corps had no jurisdiction over Carabells' property) Such a result would be repugnant to the SLA and divest the States and Carabells of vested rights through the application of an ex post facto definition of "waters of the United States". The Corps is using this new definition as well as the decision in *Riverside Bay View Homes, Inc., supra,* to change long standing principles of property law.

In the *Riverside Bay View Homes, Inc, supra,* this Court allowed a decision to stand which allows the Corps to regulate wetlands that are adjacent to "water of the United States". A year earlier in 1984, In *Summa Corporation v. California*, 466 U.S. 198, 80 l Ed 2d 237, however, the Supreme Court ruled that a lagoon whose title was confirmed by federal patent to original grantees was held not subject to public trust easement. *Summa Corporation* demonstrates clearly that patented land under water **are not** "waters of the United States." Furthermore, the State of California was prevented from placing a "Public Trust Easement" against the private landowners. Now twenty-one years later, the Corps is being granted jurisdiction over

property which they conveyed either directly or indirectly (through the State) by means of a retro-active change in the definition of "waters of the United States". The net result is that the Corps is being allowed by the lower court decisions to place a "Public Trust Easement" which was not confirmed in the patent process against the Carabells' property. This "public trust easement" requires the Carabells' to leave their property in its natural state and eliminates vested property development rights previously granted by the State of Michigan. Under the "equal footing doctrine", if the State of California can't enact a new law creating a "public trust easement" against private property, neither can the United States Congress or its agencies such as the "Corps." As stated on remand from the Supreme Court, *Summa and Los Angeles v Venice Peninsula Properties*, 205 Cal. App.3d 1522, 253 Cal.Rptr. 331 pg 335, states; "the patent of the government is evidence of title and is conclusive against the government and all persons claiming under it. The patent is a deed of the United States and operates as a quit claim of **any interest of the United States ..."**

In *Riverside Bay View Homes, Inc., supra*, the record is unclear

as to whether the wetlands adjacent to "navigable waters" of Lake St. Clair were unpatented bottom lands or lands previously conveyed directly or indirectly by the United States. This may account for the very "unusual" ruling in *Riverside Bay View Homes, Inc., supra.* It is Harkins' position that if the land was in fact conveyed under federal patent, then the principles of *Summa and Los Angeles v Venice Peninsula Properties, supra* would apply which would have prevented any Corps jurisdiction. This is because the United States already transferred all rights and interest in the subject property. There was no need for a redefinition of "waters of the United States" because the definition under 43 U.S.C. 1301 is part of a long standing regulatory system under the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands."

Under Michigan law, In the Michigan Supreme Court decision *Oliphant v. Frazho*, 381 Mich 630, the State of Michigan was estopped from preventing a private land owner (claiming title from a U S patent) from filling land under Lake St. Clair which was conveyed to him by the patent.

The application of the newly defined term "waters of the United States" under 33 C.F.R. 328.3 to the Carabells' property represents a sudden change in the bundle of rights granted Michigan property owners under Michigan Law. In *Hughes v. State of Washington* 88 S. Ct. 438 (1967) pg. 296 the Supreme Court notes:

> "to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple asserting retroactively that the property it has taken never existed at all."

It is Harkins' position that the words "State" and "Corps" are interchangeable and the Corps' application of definitions in 33 C.F.R. 283.3 to Carabells' property retroactively asserts that the **vested property rights which it denies** never existed at all.

Under Michigan law, In *Klais v. Danowski* 373 Michigan Reports 262, (1967) pg 272, the Michigan Supreme Court noted:

> "It is settled law in this country that lands underlying

navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to paramount power of congress to control such waters for the purposes of navigation."

Under Michigan law it **would not** have been unlawful for the State of Michigan to have sold Carabells' property to his predecessors in title. This is based upon the fact that the property serves no navigational benefit to interstate commerce because it is located one mile from the nearest body of navigable water and without any navigable connection. Furthermore, *Klais, supra*, pg 276 it states:

"the question is raised whether the patentees and **those claiming under them have lost from the then dry lands originally patented** to them title to so much of the private claims as, subsequent to the date of the patent, may have become inundated by rising lake levels or through the processes of avulsion or erosion. That the answer should be held to be in the negative.....The Michigan State legislature seems to have recognized a distinction between patented and unpatented lands..."

The Carabells have a vested right to restore their property back to dry land and never lose title should it become submerged due to erosion or rising lake levels. Even though the Carabells had a right to restore their property back to dry land, this right under Michigan Law is subject only to the State's police power to regulate public health, safety and welfare. Carabells' vested rights were perfected during the State of Michigan's permit process. The MDEQ's Final Determination and Order, 9-30-99 is a validation of his vested development rights.

This order mandated that the Carabells downsize their proposed development and be granted a permit allowing them to develop the property according to the MDEQ's alternative plan which minimized any unacceptable environmental harm to the eco-system.

In *Summa, supra*, at pg336, the Court states on the issue of allowing a public trust easement to be placed upon Summa's property:

"It is difficult for us to see how the patent can be described as settling in the grantee a full and **complete** title, while at the same time holding that it was burdened by a servitude of the magnitude of

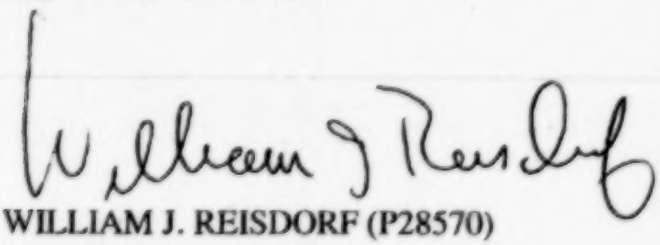
that asserted by the State in this action." The result of allowing the Corps to use its newly created definition of "waters of the United States" under 33 C.F.R. 328.3 to gain jurisdiction over Carabells' property also unreasonably places burdens on Carabells' property which were not part of the patent process and title. Once the federal government gave up title, the Corps was estopped from interfering just as the State of Michigan was in *Oliphant, supra.*.

CONCLUSION

For reasons stated above; the Corps' new definition of "waters of the United States" under 33 C.F.R. 328.3 is illogical and conflicts with other definitions under Title 43 of the Public Lands and the Act of Congress of 1820, An Act making further provision for sale of the Public Lands. These definitions under 33 C.F.R. 328.3 are repugnant to Congress' regulatory scheme for sale of federal land and aversely affect the property titles of millions of U.S. property owners. This Honorable Court should find that these definitions exceed Constitutional limits and are therefore unenforceable. *Amicus Curiae*, Harkins, would ask this Honorable Court to substitute the long standing definition of "waters of the United States" and

recognize that such definition does not include land which the United States has already conveyed to the general public. Furthermore, Harkins would ask this Honorable Court to find the Corps has no Jurisdiction under CWA over Carabells' property.

Respectfully submitted,



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Nos. 04-1034, 04-1384

DEC 2 · 2005

In The
Supreme Court of the United States

JOHN A. RAPANOS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

–and–

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

**On Writs Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF *AMICUS CURIAE* HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA SUPPORTING PETITIONERS

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BRIEF *AMICUS CURIAE* OF HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA

I. INTEREST OF THE *AMICUS CURIAE*[1]

The Home Builders Association of Central Arizona (HBACA) is a non-profit corporation organized in 1951 under the laws of the State of Arizona to provide a means for businesses in the housing and real estate industries in central Arizona to address issues and concerns relating to those industries. Under its association with the National Home Builders Association, HBACA is authorized to represent constituent members in the Arizona counties of Maricopa, Pinal, Apache, Navajo, Gila, Graham, Greenlee, Cochise, Yavapai, Yuma and La Paz. These counties represent a vast territory in Arizona, with very diverse hydrogeology, topography, natural and man-made drainage, and with a very rapidly expanding population.

Defining "navigable waters" across this diverse and mostly arid region affects many aspects of the home building industry. Land development in Arizona often involves crossing small natural drainages and rerouting

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[1] Pursuant to Rule 37.3(a), Rules of the Supreme Court, *amicus curiae* Home Builders Association of Central Arizona states that letters of consent have been obtained from the United States of America and Petitioners in both cases. The consent of the United States of America is filed herewith. The consent of Petitioner Carabell is filed herewith. Consent from the Petitioner Rapanos is already on file with the Clerk.

Pursuant to Rule 37.6, Rules of the Supreme Court, counsel for *amicus curiae* Home Builders Association of Central Arizona state that they authored this brief in whole; no counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution for preparation or submission of this brief.

man-made irrigation canals. Thus, an overly expansive definition of navigable waters has a direct and immediate impact on site preparation – the very foundation of new home construction.

HBACA is also interested in the social policy of affordable housing in Arizona. Too often, when regulatory policies affecting growth and development are being implemented at the federal level, the impact on locally affordable housing is overlooked. Policy-level decision-makers within most governmental agencies are not typically affected by lack of affordable housing in places like Arizona, yet their policy decisions directly affect our costs. HBACA is close to the issue of affordability at the retail homebuyer level, and is therefore in a unique position to comment on the true cost of these regulatory programs.

II. SUMMARY OF THE ARGUMENT

The United States Army Corps of Engineers defines "navigable waters" under the Clean Water Act to include all tributaries, and tributaries of tributaries, of traditionally navigable waters, up to the ordinary high water mark of any such tributary. In Arizona, this results in federal land use regulation at the micro level, dictating alternatives and mitigation requirements not only under the Clean Water Act, but also under the National Environmental Policy Act and the Endangered Species Act.

Once within jurisdiction, federal regulation spreads beyond just the impact on the "navigable water" and includes all of the land within the proposed development project. This type of federal regulation exacerbates an already acute crisis in affordable housing in Arizona.

This type of federal regulation also extends beyond Congress' intent in creating the Clean Water Act, which expressly protects the rights of States to control local land use planning decisions. Like the migratory bird rule that this Court invalidated in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001), the regulation of tributaries in this fashion exceeds the authority granted under the Clean Water Act.

We urge the Court to reverse the decision in these two consolidated cases and set forth guidelines that will enforce the requirement of a significant federal nexus between navigable-in-fact waters and their tributaries.

III. ARGUMENT

Any law that affects the cost of housing in Arizona affects HBACA. The definition of "navigable waters" at issue in these two consolidated cases is such a law.

The Clean Water Act (CWA)[2] establishes two regulatory permitting programs for discharges to "navigable waters."[3] Section 404 requires a permit for the discharge of dredged or fill material into navigable waters and is administered by the U.S. Army Corps of Engineers (Corps), with oversight by the U.S. Environmental Protection Agency

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[2] Also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

[3] The term "navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), which is in turn defined by regulation to include not only all traditional navigable waters, but also all "impoundments of water otherwise defined as waters of the United States" and "[t]ributaries of waters" of the United States and "wetlands adjacent to waters" of the United States. 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a)(4), (5) and (7).

(EPA).[4] Section 402, also called the National Pollutant Discharge Elimination System (NPDES) program, requires a permit for discharge of pollutants (other than dredged or fill material) into navigable waters and is administered by EPA.[5]

The two cases at issue here, *Rapanos v. United States*, Cause No. 04-1034,[6] and *Carabell v. United States Army Corps of Engineers*, Cause No. 04-1384,[7] involve the extent of federal CWA jurisdiction over the use of fill material on private lands that contain waters that may, or may not, be classified as navigable waters within the meaning of the CWA. They both turn on the reach of federal authority over so-called adjacent wetlands – that is, wetlands that are adjacent to navigable waters but which are not, themselves, navigable waters. In this inquiry, the Court of Appeals for the Sixth Circuit noted:

> What is required for CWA jurisdiction over "adjacent waters," however, is a significant nexus between the wetlands and 'navigable waters' which can be satisfied by the presence of a hydrological connection.[8]

Apparently, however, not even a "hydrological connection" is required in some cases. For example, the Court of Appeals for the Ninth Circuit has recently held:

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[4] 33 U.S.C. § 1344 (herein referred to as "§ 404").

[5] 33 U.S.C. § 1342.

[6] *United States v. Rapanos*, 376 F.2d 629, 639 (6th Cir. 2004).

[7] *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

[8] *United States v. Rapanos*, 376 F.2d 629, 639 (6th Cir. 2004) (citations omitted).